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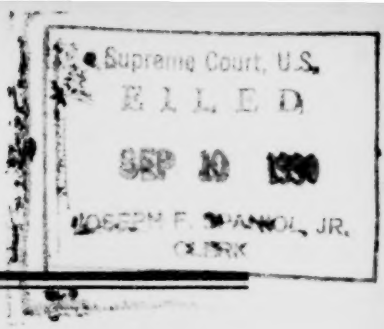

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PAULETTE SHELTON,

Petitioner,

v.

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to The Supreme Court of The State of Ohio

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

1. Whether the retroactive application of a state statute which infringes upon vested rights is a denial of constitutional guarantees of the equal protection of the laws and due process?

2. Whether the retroactive application of a state statute imposing a limitation of damages, which is applied subsequent to a jury's finding, acts as a taking of property without just compensation, in violation of the Fifth Amendment to the United States Constitution?

3. Whether the retroactive application of a state statute, applying a limitation on damages, which have been properly found to exist by a duly empaneled jury, invades upon the province of the jury, thereby denying the Petitioner her right to a jury trial as guaranteed by the Seventh Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to this proceeding are PAULETTE SHELTON, Petitioner and the GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY (GCRTA and/or RTA), Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Other Authorities:

OPINIONS BELOW

The Journal Entry of the Court of Common Pleas of Cuyahoga County, Ohio, journalizing the unanimous jury verdict of $750,000.00 for the Plaintiff/Petitioner, and the Judgment Entry and Opinion of the Honorable Trial Judge, denying the Defendant-Respondents Motion to Limit Plaintiff's Damage Award appear in the Appendix. The opinion of the Court of Appeals of Ohio, Eighth Appellate District, County of Cuyahoga, reversing the jury verdict of $750,000.00 and entering judgment for the Defendant-Respondent, is unreported and also appears in the Appendix. The entry of the Supreme Court of Ohio, overruling the Petitioner's Motion seeking jurisdiction is also unreported and appears in the Appendix.

JURISDICTION

On March 18, 1988, at the conclusion of a four (4) day jury trial, a unanimous verdict was rendered in favor of the Plaintiff/Petitioner herein, Paulette Shelton, against the Defendant/Respondent, Greater Cleveland Regional Transit Authority, in the amount of $750,000.00. In a post trial motion the Respondent sought to limit the Petitioner's damage award to no more than $250,000.00 pursuant to the retroactive application of a sovereign immunity damage cap found in Ohio Revised Code Section 2744.05(C). On June 22, 1988, the trial court entered its judgment entry and opinion denying the Respondent's Motion to Limit Plaintiff's Damage Award.

On December 7, 1989, the Court of Appeals of Ohio, Eighth Appellate District, County of Cuyahoga, entered its order reversing the judgment for the Petitioner, thereby reversing the judgment of the jury.

On June 13, 1990, the Supreme Court of Ohio entered its order denying the Petitioner's Motion to Order the Court of Appeals to Certify its Record. From that decision this Petition for Certiorari was timely filed. Title 28 U.S.C. Section 1257(3) confers jurisdiction on this Court to review this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, Seventh Amendment, and Fourteenth Amendment to the United States Constitution appear in the Appendix.

STATEMENT OF THE CASE

On Monday evening, January 14, 1985, Sharon Albright alighted from a Greater Cleveland RTA (hereinafter "RTA") transit train at the Superior Station at 6:00 p.m. enroute home from work. As she left the train, a gun was shoved in her back and she was forcibly abducted. A short distance away, Ms. Albright was violently raped. These criminal acts were reported to the East Cleveland Police Department and the RTA Police.

The very next night, January 15, 1985, Paulette Shelton also alighted from the very same RTA rapid transit train at the same Superior Station on her way home from work at 6:00 p.m. She was also forcibly abducted from the station at gunpoint in the exact same manner as Sharon Albright. After dumping Ms. Shelton's purse contents onto the hood of her car in the RTA parking lot, the assailant proceeded to thoroughly search Paulette Shelton, all while standing outside the car in the RTA lot. She was then forced into her car and violently raped at gunpoint *three (3) times*

in the RTA parking lot before being driven away in her own vehicle. Ms. Shelton was later able to escape her assailant, report the crimes to the police, and obtain necessary medical care and attention at nearby Huron Road Hospital. It was there that the victim and her father heard firsthand from an RTA Policeman that the RTA Police were aware of the identical crime occurring the very night before at the same time and location by the same assailant who was later arrested, identified and confessed to both crimes.

The evidence at the trial conclusively established the fact that there had been many other crimes at the Superior Rapid Station where the Petitioner was evidently raped for several years predating the case at bar. Evidence also set forth the fact that the Superior Rapid Transit Station was notorious for the high incidence of crime and that the RTA management and police force knew of this dangerous condition, yet did nothing to protect its fare paying passengers including the Petitioner herein. Further testimony established that RTA's management had reports and knew that various security remedies such as security cameras were available and, in fact, successfully deployed at other rapid stations. Despite this fact, RTA failed to provide adequate security personnel or devices such as security fencing, lighting, or cameras, and made a conscious decision to continue to operate the Superior Rapid Station with a reckless disregard for the safety of its passengers including the Petitioner.

As a result of the willful and wanton conduct on the part of RTA, Paulette Shelton was seriously injured physically, and permanently injured psychologically. She filed her Complaint in the Court of

Common Pleas of Cuyahoga County seeking compensation for the damages sustained by her. The evidence presented at trial established that the Petitioner's injuries were proximately caused by RTA's negligence in failing to provide and/or maintain adequate security operations necessary for the protection of its fare-paying passengers using the Superior Rapid Station. Subsequent to the night of the repeated crimes, Ms. Shelton sought and received psychiatric care and counseling from several doctors. The ultimate diagnosis, wholly unrefuted, was that Paulette Shelton was suffering from, and continues to suffer from Post Traumatic Stress Disorder which is chronic and permanent in nature, including many symptoms such as agoraphobia, the fear of going out of her house at night, fear for her life and total abstinence of sex.

After a four (4) day trial on this matter, the jury returned a unanimous verdict for the Petitioner in the amount of $750,000.00. Subsequent to the jury verdict, the defendant filed post-trial Motions for Judgment Notwithstanding the Verdict or, in the alternative, Motion for a New Trial, and Motion to Limit Damage Award. Plaintiff filed a Motion for PreJudgment Interest. Subsequently, the court denied the Defendants' Motions and also denied the Plaintiff's Motion for PreJudgment Interest.

The Plaintiff timely appealed the trial court's denial of her Motion for PreJudgment Interest which was assigned Appellate Case No. 56287. The Defendant appealed its adverse rulings on the Post-Trial Motions and that appeal was assigned Appellate Case No. 56431 and consolidated with Plaintiff's case.

In the defendant's Post-Trial pleading, RTA attempted to limit the Plaintiff's damage award to no

more than $250,000.00 pursuant to the alleged Sovereign Immunity Damage Cap set forth in O. R. C. 2744.05(C). The trial court correctly found that the damage cap provided for in that Revised Code section effected the Plaintiff's substantive rights. The attempted *retroactive* application of that statute to the Petitioner's cause of action was therefore appropriately found to be *unconstitutional* as violating the prohibition against the passage of retroactive laws. The court further went on to find that O.R.C. 2744.05(C) was unconstitutional as being violative of the equal protection guarantees of the Ohio and United States Constitutions.

On or about January 16, 1990, the Plaintiff-Appellant submitted her Notice of Appeal to the Court of Appeals establishing her attempt to seek review by the Ohio Supreme Court. Her Memorandum in Support of Jurisdiction was timely filed in March of 1990, in which it was affirmatively established that the Appellate Court erred in its application of existing Ohio law and that the attempted retroactive application of Ohio Revised Code Section 2744.05(C) violated both the Ohio and Federal Constitutions. It was further established that the Court of Appeals improperly extended a limited and narrow principle set forth in the Ohio case of *Sawicki v. Ottawa Hills*, 37 Ohio St.3d, 222 (1988). The Petitioner's Memorandum in Support of Jurisdiction to the Ohio Supreme Court clearly established that the Court of Appeals decision interpreting *Sawicki* was erroneously applied in the context of the facts of the case at bar. The Court of Appeals decision had compounded an already unconstitutional statute, leaving Ohio as a potential prec-

edent for clearly erroneous and unconstitutional authorities.

On June 13, 1990, the Ohio Supreme Court, without opinion, overruled the Petitioner's motion for an order directing the Court of Appeals of Cuyahoga County to certify its record.[1] This Appeal ensued in order to establish the error committed by the Ohio Courts below.

REASONS FOR GRANTING THE WRIT

I. THE RETROACTIVE APPLICATION OF A LIMITATION OF AWARDED DAMAGES, AS FOUND IN OHIO REVISED CODE SECTION 2744.05(C) ACTS AS A TAKING OF PROPERTY WITHOUT JUST COMPENSATION, VIOLATIVE OF THE "TAKING CLAUSE" OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IS ALSO A BLATENT VIOLATION OF THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF BOTH ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The retroactivity provision of Ohio Revised Code Section 2744.05(C) is unconstitutional and, therefore, renders the section inapplicable to the pending case. Ohio Revised Code Section 2744.01, et seq. is a direct corollary and legislative response to the abrogation of municipal immunity. Historically, the common law doctrine of municipal immunity precluded liability on the part of a municipal corporation for its negligent conduct of governmental functions. However, this

[1] Due to the obvious importance of the case and the ultimate impact the decision may have, the denial by the Ohio Supreme Court for a review was rendered by a four to three split decision, with Justices Holmes, Douglas and H. Brown dissenting, urging review by the Ohio Supreme Court.

concept was abrogated by the Ohio Supreme Court in *Haverlack v. Portage Homes, Inc.*, 2 Ohio St.3d 26, 442 N.E.2d 749 (1982), and its progeny e.g., *Enghauser v. Eriksson Engineering Ltd.*, 6 Ohio St.3d 31, 451 N.E.2d 228 (1983). The rationale behind the abolition of common law municipal immunity is the obvious inequity of forcing an innocent victim to bear the expense of injury due to the negligence of a municipal corporation. *Enghauser*, supra, at 34; *Haverlack*, supra, at 30. A municipality is better able to absorb the cost of an injury it causes than the individual victim, *Haverlack*, supra, at 30.

Ohio Revised Code Section 2744.01, et seq., effective November 20, 1985, provides that political subdivisions of the State of Ohio are, in certain circumstances, to be immune from civil liability in damages for injury, death, or loss to persons or property. Putting aside for the moment the statute's inherent unconstitutionality, (which will later be discussed herein) the important question is the extent to which this statute is to be applied retroactively. The retroactivity of these provisions was originally governed by Section 5 of the Amended Substitute House Bill Number 176 of the 116th General Assembly. The retroactivity provisions of Section 5 were in turn amended by substitute Senate Bill Number 297, which became effective on April 30, 1986. It is Amended Section 5 that determines the retroactivity of the damages provisions of this legislation.

Section 5(B) provides that the damages provisions of Section 2744.05(C) are retroactive in cases (1) which arose prior to November 20, 1985, (2) that are not time-barred, and (3) in which a trial had not commenced prior to November 20, 1985. Little or no Ohio

case law directly on point exists interpreting the constitutionality of the retroactivity provisions of this code section. Therefore, it becomes incumbent to look to Ohio decisions and laws interpreting retroactivity provisions of other legislation or statutes that are analogous to the case at bar.

The retroactive application of other legislation has also been denied repeatedly by many Ohio courts. Initially, Article II Section 28 of the Ohio Constitution specifically states, inter alia, the "General Assembly *shall have no power to pass retroactive law* or laws impairing the obligation of contracts" (Emphasis added); the words "retrospective" and "retroactive" as applied to laws, are synonymous. Upon principal, every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed, must be deemed "retrospective." *Rairden v. Holden*, 15 Ohio St.207. Further, the provisions of the Ohio Constitution, which provides that the legislature shall not pass retroactive laws, applies to substantive rights. *State, ex rel Michaels v. Morris*, 75 Ohio Law Abstracts 536. The attempted application of Revised Code Section 2744.05(C) to the facts of the case at bar are totally impermissible and constitute an unconstitutional act of the legislature under Article II, Section 28 of the Ohio Constitution. In *Graley v. Satayathum*, 343 N.E.2d 832 (1976), Judges George J. McMonagle and George W. White of the Cuyahoga County Court of Common Pleas ruled upon the constitutionality of various provisions of the 1975 Medical Malpractice Act including the attempted retroactive application of that statute. As a general prin-

cipal of law, it was held that a statute which affects a substantive right, as distinguished from a procedural right, may not be applied retroactively. The court held that the 1975 Medical Malpractice Act, which, inter alia, limited the amount of compensatory damages to $200,000.00 in a medical malpractice claim, affects a substantive right and thus, insofar as any of its sections are constitutionally valid, *does not apply retroactively*. The *Graley* court also cited with approval the case of *Young v. Alberts*, 342 N.E.2d 700, 73 Ohio Op.2d 32 (1975). In the *Young* case, the court held that if it were to be held that the limitation of the amount recoverable as general damages were retrospective in effect, this would change a substantive right and thus, render this provision of the act unconstitutional. The *Graley* court cited this quotation and stated, "it is obvious that the above opinion is well founded in law." *Id.*, at 839.

With regard to the law in Ohio of Worker's Compensation, Ohio Revised Code Section 4121.80 is yet another strikingly similar example of the legislature's attempt to impose a law retroactively. Several trial courts have ruled upon the unconstitutionality of the retroactive provisions of that Code Section. In *Shelton v. U.S. Steel*, U.S. District Court, Northern District Ohio, Number C-1-86-740 (January 15, 1987), the District Judge specifically ruled that the retroactivity clause found in Revised Code Section 4121.80(H) violates the due process clause of the Fourteenth Amendment, and Article II, Section 28 of the Ohio Constitution. Finally, there is a recent plethora of decisions, too numerous to cite here, which have found the attempted retroactive application of O.R.C. 4121.80(G) to be unconstitutional.

Petitioner's cause of action accrued on January 15, 1985. As such, the Petitioner's substantive right to obtain compensation for these injuries under Ohio Law became vested on *January 15, 1985*. Respondents' attempted application of the retroactive clause of Revised Code Section 2744.05(C), effective *April 30, 1986*, is an attempt to retroactively impair the Plaintiff's substantive rights which vested on January 15, 1985 pursuant to the law of Ohio in effect on that date.

Under the due process clause of the Fourteenth Amendment, "vested rights created by statute cannot be abridged by a subsequent statute that effectively takes away accrued causes of action to enforce those rights". *Hammond v. United States*, 786 F.2d 8, 11 (1st Cir. 1986). The Sixth Circuit, applying Ohio law, has specifically held:

> In tort claims, there is no cause of action and therefore no vested property right in the claimant upon which to base a due process challenge until injury actually occurs.
>
> *Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 141 (6th Cir. 1983).

In Ohio, at the time of the damage underlying this suit, no sovereign immunity existed for municipalities. *See, Haverlack v. Portage Homes*, 2 Ohio St.3d 26, 442 N.E.2d 749, 752 (1982). Further, the Ohio Supreme Court had long held, prior to the enactment of O.R.C. Section 2744.05(C) that the doctrine of sovereign immunity is inapplicable where, as here, a municipality is acting in a proprietary function. *See*, e.g., *Hall v. City of Youngstown*, 15 Ohio St.2d 160, 239 N.E.2d, 57 (1968).

Applying the foregoing to the facts in the case at bar, the Petitioner asserts that her due process rights have been violated by the Ohio Legistatures attempt to retroactively apply the challenged statute. Petitioner asserts that it becomes clear that the retroactive provisions of Section 2744.05(C) is a blatant violation of Article II, Section 28 of the Ohio Constitution and is also a blatant violation of her due process rights applicable to her by the Fourteenth Amendment to the United States Constitution.

The retroactivity clause of Revised Code Section 2744.05(C) is also violative of *"equal protection"* under the laws pursuant to the Fourteenth Amendment of the Federal Constitution and Article I, Section 2 of the Ohio Constitution. The Equal Protection Clause of the Federal and Ohio Constitutions prohibits the State from denying to any person within its jurisdiction the equal protection of the laws. This provision requires that persons under like circumstances be given equal protection in the enjoyment of personal rights in the prevention and redress of wrongs. In the pending case, the attempted retroactive application of the Statute denies the Petitioner the equal protection of the law. Revised Code 2744.05(C) is discriminatory against the Petitioner and the class of persons who fall within the very narrow category of having been injured prior to November 20, 1985, who were not barred by the statute of limitations, and whose trial did not commence prior to November 20, 1985. Based upon this definition, it is clear that a person with identical injuries to the Petitioner in the case at bar, but who commenced their trial prior to November 20, 1985, would be entitled to full legal

redress for their injuries as opposed to the Petitioner herein, who would not be entitled to full legal redress.

The cases cited above in this section which specifically denied the retroactive enforcement of similar statutes also denied their applicability on the basis of a denial of the equal protection of laws.

Therefore, based upon the foregoing, it is clear that the retroactivity provisions of Revised Code Section 2744.05(C) is inherently unconstitutional and, therefore, inapplicable to the case at bar. Based upon retroactivity alone, Petitioner's jury verdict in the amount of $750,000 must be permitted to stand.

The limitation of damages found in Ohio Revised Code Section 2744.05(C) deprives the Plaintiff of the equal protection of the laws under both Article I, Section 2 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution. The limitations placed upon governmental action by the Equal Protection Clauses of the Ohio and United States Constitution are essentially identical. *Porter v. Oberlin*, 1 Ohio St.2d 143 (1965), *State, ex rel Strubel v. Davis*, 132 Ohio St. 555 (1937). As such, the Petitioner will address the equal protection issues under one analytical framework.

The first issue to be addressed is the appropriate level of scrutiny to be applied by the courts to the legislation in question. In Ohio, the "two-tiered test" applied by the Federal Courts is the appropriate method for the determination of legislative compliance with equal protection standards. Simply stated, the test is that unequal treatment of classes of persons by a State is valid only if the State can show that a rational basis exists for the inequality unless the

discrimination infringes upon the exercise of a fundamental right or establishes a suspect classification. *McGowan v. Maryland*, 366 U.S. 420 (1961). If, however, the challenged legislation infringes upon a fundamental right, it becomes subject to strict judicial scrutiny and will be upheld only upon a showing that it is justified by a compelling state interest. Thus, once the existence of a fundamental right or a suspect class is shown to be involved, the state must assume the heavy burden of proving that the legislation is constitutional under a strict scrutiny test. *See* e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Board of Education v. Walter*, 58 Ohio St.2d 368 (1979).

The Petitioner submits that a strict scrutiny test should be applied in the analysis of Section 2744.05(C) of the Ohio Revised Code. As the specific question in this matter presents a case of first impression in Ohio, it again becomes incumbent to look to the decisions of other Courts interpreting similar statutes.[2] In *Graley, supra* and *Simon v. St. Elizabeth Medical Center*, 355 N.E.2d 903 (1976), the court applied a strict scrutiny standard in determining the $200,000 damage limitation in Ohio's Medical Malpractice Statute unconstitutional. These cases stand for the proposition that, under a strict scrutiny standard, the State must establish compelling State interests furthered by the questioned legislation. Strict judicial scrutiny of Ohio's Medical Malpractice Act in those cases could not disclose the compelling State interest allegedly purported by the legislation. As such, the legislation was found to be violative of the equal protection clause

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[2] See appendix for non-inclusive list of cases invalidating damage caps as unconstitutional.

of the Ohio and United States Constitution and, therefore, inapplicable to those cases and *unconstitutional.*

The Petitioner submits that Section 2744.05(C) violates equal protection guarantees by classifying tort victims in at least three (3) different ways: (1) It classifies victims of negligence who have sustained non-economic damages by whether they have been injured by a non-government tort-feasor or a government tort-feasor—it totally denies any recovery to the latter class; (2) it classifies victims of government tort-feasors by whether they have suffered economic damages or non-economic damages—it allows recovery to the former group up to $250,000 while it totally denies recovery to the latter group; (3) it classifies victims of government tort-feasor by the severity of the victim's injuries—it grants total recoveries to those victims who have not sustained significant injures by allowing them to recover up to $250,000 in economic damages—it clearly discriminates against those very seriously and catastrophically injured victims, such as the Petitioner herein, by denying recovery for any injuries over $250,000. The challenged statute is, therefore, affecting the Petitioner's fundamental right to seek and obtain fair and adequate compensation for all of the injuries sustained by her. Under an equal protection analysis, when legislation affects a fundamental right, it must be measured by a strict scrutiny test. *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). Application of the strict scrutiny test requires that the statutory scheme be found unconstitutional unless the State can demonstrate that such law is necessary to promote a compelling governmental interest. Because Ohio Revised Code Section 2744.05(C) imposes unjust classifications

of victims and affects the Petitioner's fundamental rights, a strict scrutiny analysis must be applied in determining the constitutionality of the challenged section. The Respondent can provide *no compelling State interest* being furthered by the legislation in question.

It is inconceivable to think of an argument which could be propounded by the Respondent to justify an allegedly compelling State interest which justifies the infringement upon the Petitioner's fundamental constitutional rights. In the case of *White v. State*, 661 P.2d 1272 (Montana, 1983), the State argued that it had shown a compelling State interest in "insuring that sufficient public funds will be available to enable the State and local governments to provide those services which they believe benefit their citizens and which their citizens demand." In that case, the District Court found that this bare assertion, however, falls far short of justifying a discrimination which infringes upon fundamental rights. The Supreme Court of Montana agreed with the District Court's reasoning. The *White* Court applied the strict scrutiny test to the challenged legislation and found that that legislation violated the equal protection clauses of the Federal and State Constitutions and the $300,000 damage limitation was declared *unconstitutional.*

The *White v. State, supra* case is strikingly similar to the facts in the case sub judice. In *White*, the Plaintiff sought to prove that as the result of the reckless conduct of the State of Montana, she was attacked by a violent and dangerous criminal and as a result, sustained severe emotional injuries which significantly affected her ability to live a happy and fulfilling life. The negligence alleged against the State

was premised upon the State permitting the assailant to escape from a mental hospital and remain free for a period of several years without serious attempts to locate and reincarcerate this dangerous individual. The state attempted to limit its damages pursuant to Montana Constitutional Amendment Section 2-9-104 and 2-9-105 providing for a State immunity from exemplary and punitive damages and applying a $300,000 limitation in government liability for damages in tort. The Supreme Court of Montana, in an extremely well reasoned, logical and intellectual opinion, held:

1) the constitutional guarantee of equal protection requires that all persons be treated alike under like circumstances;

2) a statute affecting a fundamental right must be measured by a strict scrutiny test;

3) the application of a strict scrutiny test to a statute requires that the statutory scheme be found unconstitutional unless the State can demonstrate that such law is necessary to promote a compelling government interest;

4) the right to bring a civil action for personal injuries is a fundamental right and a statutory scheme affecting that right is subject to a strict scrutiny analysis;

5) the statutory limitation on economic damages for which the state and political subdivisions thereof may be held liable impermissibly discriminates between recovery for pain and suffering and the recovery for economic damages, and such

> statute is, therefore, *unconstitutional* in light of the failure of the State to demonstrate a compelling State interest to justify that limitation. *White v. State*, supra.

Following *White*, the Montana Supreme Court again was called upon to determine the validity of a cap on damages in the case of *Pfost v. Montana*, 713 P.2d 495 (Mont., 1985). In that case, the Montana Supreme Court held that a $300,000 cap on damages under the State Tort Claims Act prejudices a fundamental interest of victims to recover full legal redress for injury, warranting strict scrutiny of its discriminatory impact, and is violative of the State constitutional guarantee of equal protection. This Court ably allowed and recognized the rights of a traumatized accident victim to recover full compensation as being one of the basic civil rights of man and declared the damage limitation cap to be *unconstitutional*. The Supreme Court concluded that the States' arguments that an alleged insurance crisis existed and that the State needed the $300,000 damage limitation to assure sufficient funds for public services was not supported by any evidence and were not persuasive arguments when violating a fundamental individual right guaranteed by the Constitution.

Due to the almost identical similarity in the fact pattern and challenged legislation in the *White* and *Pfost* cases to the facts and legislation in the case at bar, the arguments raised in those cases are strongly persuasive upon this Court and directly on point as to the issues presently before this Court. The Petitioner has clearly identified a suspect classification arising as the result of Ohio Revised Code Section 2744.05(C). Further, this statute clearly affects

the fundamental constitutional rights of the Petitioner. Therefore, the Court must apply a strict scrutiny test in determining the constitutionality of the challenged statute. In applying the applicable strict scrutiny test, the defendant can provide no compelling State interest being furthered by the challenged legislation. As such, it is clear that the challenged statute violates equal protection and is, therefore, *unconstitutional.*

Again, due to the fact that there are no reported Ohio Supreme Court cases considering the constitutionality of Section 2744.05(C), this Honorable Court is urged to look to other Ohio courts who have found similar code sections to be unconstitutional as violative of the Equal Protection Clause. In the case of *Duren v. Suburban Community Hospital*, 482 N.E.2d 1358, a jury returned a verdict in favor of the Plaintiff in the amount of $2.5 million for wrongful death and $1 million for pain and suffering due to the negligence and indifference of the defendant hospital. The defendant moved to reduce the $1 million award under Ohio Revised Code Section 2307.43, which limits general damages in medical malpractice actions to $200,000. In rejecting the defendants' motion, the highly regarded Judge James McMonagle refused to apply the $200,000 cap on general damages as being violative of the equal protection guarantees of both the Federal and State Constitution. Judge McMonagle opined: "simply stated, the legislative scheme of shifting responsibility for loss from one of the most affluent segments of society to those who are most unable to sustain that burden, i.e., horribly injured or maimed individuals, is not only inconceivable, but shocking to this court's conscious." Judge McMonagle then quoted from *Carson v. Maurer*, 424 A.2d 825

at 828 (N.H. 1980), stating "it is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and, therefore, most in need of compensation." Based upon the foregoing, the Ohio damage cap legislation in that case, which is analogous to the case at bar, was struck down as violating the protection of both the Ohio and Federal Constitutions beyond a reasonable doubt and determined to be *unconstitutional.*

Based upon the foregoing, it becomes abundantly clear that the attempted $250,000 cap on damages provided for by O.R.C. Section 2744.05(C) violates the equal protection guarantees afforded by the Ohio and Federal Constitutions. This renders the statute *unconstitutional* and, in turn, inapplicable to the case sub judice.

Numerous jurisdictions throughout the United States, including Florida, Idaho, Illinois, Kansas, Montana, North Dakota, New Hampshire, New Mexico, Ohio, Texas, Virginia, and Washington have held damage limitations to be unconstitutional. Following the logic and reasoning of the *White* and *Pfost* cases, the Petitioner is confident that upon review, this Honorable Court will acknowledge the error committed by the Eighth District Court of Appeals of Cuyahoga County, Ohio in refusing to strike down O.R.C. Section 2744.05(C) due to its inherent unconstitutionality and the unconstitutional retroactive application of that statute.

Finally, Ohio has held that the retroactive application of Revised Code Section 2744.05(B) acts as a taking of property without just compensation, violative of the "Taking Clause" of the Fifth Amendment

of the United States Constitution. Sf. *Greyhound Food Mgt. v. Dayton* (S.D., Ohio 1986) 653 F.Supp. 1207, at 1218-1221. The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The importance of the Fifth Amendment to the United States Constitution was never considered by the Eighth District Court of Appeals for Cuyahoga County in rendering its decision. Other courts in Ohio have held that the attempt to apply a statute of this nature retroactively, infringes upon and violates substantive due process. Upon full review by this Honorable Court it will be clearly demonstrated that the challenged statute in fact violates the due process rights of the citizens of the State of Ohio.

For Fifth Amendment purposes, the definition of property is broad, encompassing the entire group of rights incident to ownership. *Amen v. City of Dearborn*, 718 F.2d 789, 794-95 (6th Cir. 1983). With respect to tort claims the Sixth Circuit has also held that a property right arises for due process purposes once an injury actually occurs. *See, Hartford Fire Insurance Co. v. Lawrence, Dykes, Goodenberger, Bower and Clancy*, 740 F.2d 1362, 1368 (6th Cir. 1984); *Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 141 (6th Cir. 1983).

Finally, the Ohio Supreme Court has definitively found that a cause of action based in tort is property. In *Cincinnati v. Hafer*, 49 Ohio St. 60, 30 N.E. 197 (1892) (Cited with approval in *Lake Shore Motor Freight v. Glenway Industries*, 2 Ohio App.3d 8, 440

N.E.2d 567, 569-70 (1981)), the Ohio Supreme Court set out the status of a tort cause of action:

> While a chose in action is ordinarily understood as a right of action for money arising under contract, the term is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong inflicted either upon the person or the property. It embraces demands arising out of a tort as well as causes of action originating in the breach of contract. . . .
>
> A thing in action, too, is to be regarded as a property right.

In the pending controvery the injury giving rise to the cause of action for the Court (the rape occurring on January 15, 1985) occurred prior to the enactment of Section 2744.05(C) and as such the Court must conclude that the Petitioner's cause of action is property within the meaning of the Taking Clause. The Petitioner submits that Ohio Revised Section 2744.05(C), as applied retroactively, constitutes a permanent appropriation of the Petitioner's assets (her cause of action) for the state's political subdivisions own benefit. It is unquestioned that the purpose of O.R.C. Section 2744.05(C) is to protect the fiscal integrity of political subdivisions in the State of Ohio. As such, these acts take the Petitioner's property for public benefit and therefore require that just compensation be paid.

This same reasoning was employed by the United States District Court for the Southern District of Ohio in *Greyhound Food Management Inc. v. Dayton*, 653 F.Supp. 1207 (S.D. Ohio 1986), mentioned above. In

that case the District Court concluded that O.R.C. Section 2744.05(B), as made retroactive by Substitute Senate Bill number 297, is unconstitutional, and therefore invalid, as a violation of the equal protection, due process and Taking Clause of the United States Constitution and other relevant portions of the Ohio Constitution. Although the Court in *Greyhound Food* was concerned with subsection (B) of O.R.C. Section 2744.05, the same analysis and reasoning can, and should be employed, in determining the constitutionality of subsection (C) of that code section. In applying that analysis it is clear that the challenged legislation is unconstitutional and was therefore inappropriately applied.

II. SECTION 2744.05(C) OF THE OHIO REVISED CODE IS AN UNCONSTITUTIONAL INVASION UPON THE PROVINCE OF THE JURY AND IS THEREFORE VIOLATIVE OF THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Article I Section 5 of the Ohio Constitution specifically states in relevant part "the right of trial by jury shall be inviolate. . ." Further, the Seventh Amendment of the United States Constitution provides in pertinent part, "In suits of common law, . . . *the right of trial by jury shall be preserved*, and no fact tried by jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." The right of all litigants to trial by jury cannot be questioned. While the Petitioner in the pending case does not assert that the challenged statute places a total prohibition upon her right to a jury trial, it is her contention that the statute, by its terms, *infringes* upon that right. While the right to proceed to a jury trial still exists under Ohio Revised Code Section 2744.05(C), it is clearly

not a free and unfettered right as was certainly intended by the framers of Article I, Section 5 of the Ohio Constitution. *See* e.g., *Simon v. St. Elizabeth Medical Center*, 355 N.E.2d 903 (1976). Further, this statute strongly infringes upon the "*fact-finding function of the jury*" in assessing appropriate damages. Revised Code Section 2744.05(C) places a limitation on the performance of the role of the Jury to assess damages. Inasmuch as the right to a jury as a fact finder is *guaranteed* under the Seventh Amendment and the Ohio Constitution, it, therefore, follows that such a limitation upon that right is *unconstitutional* under the provisions of those sections. *See* e.g. *Boyd v. Bulala*, 647 F.Supp. 781 (W.D.Va. 1986).

In Ohio, it is within the *sole province* of the jury to settle questions of fact, *Columbus Finance, Inc. v. Howard*, 42 Ohio St.2d 178, 327 N.E.2d 654 (1978), and this includes the question of *damages*. *Prior v. Weber*, 23 Ohio St.2d 104, 263 N.E.2d 235 (1970), and 16 O.Jur.2d Section 52. Again, Section 2744.05(C) invades the sole province of the jury and restricts the jury's ability to assess damages. Therefore, the statute *must be declared unconstitutional* under Article I, Section 5 of the Ohio Constitution and the Seventh Amendment to the Federal Constitution.

In *Boyd v. Bulala*, supra, Judge Michael stated: "In terms of the jury's role, history justifies no distinction between the liability and remedy phases of a trial at common law. To the contrary, the determination of liability and the assessment of damages are both questions which the common law reserved for the jury at common law. A party had a right to have a jury determine the severity of the injury through an assessment of damages under the Seventh Amendment.

This right is preserved." Judge Michael then went on to state "To be meaningful, the Amendment [7th A] must protect the ability of the jury to make a difference in the outcome of a trial. Clearly, the determination of damages is one of the principal ways by which the jury affects the result of a case. *The assessment of damages by the jury falls squarely with the protection of the Seventh Amendment.*" (Underline added).

As stated previously, Ohio Revised Code Section 2744.05(C) is a legislative response to a *perceived* insurance—availability crisis for municipalities. The legislatures' attempt, however, to correct this *perceived problem*, must not be permitted to infringe upon the rights of its citizens as was aptly pointed out by the author of the article, *Legislative Limitations on Damages*:

> Furthermore, in legislating damage limitations, legislatures negatively impact upon a fundamental precept of American justice. One way in which citizens participate in the shaping of society and its laws is through the jury system. The awards rendered by juries express their opinions about society and the direction it should travel. Traditionally, an American legislature's role has not been to replace its judgment for that of the citizens it purports to serve. The legislature's providence has been to steadfastly protect the rights and privileges of its electorate. In legislating damage caps which ignore the kind of *injury* inflicted and the circumstances of the victim, legislatures depart from their traditional role, and defeat a goal of reasonable

> compensation to victims. Justice is no longer blind, *it is handcuffed. Trial Magazine*, May, 1987. (Emphasis Added).

In the pending case, the Respondents' attempt to place a $250,000 cap upon the damages returned by the jury for the Petitioner is, in fact, *handcuffing justice.* It is also clear that the Respondents' attempt to cap the Petitioner's damages constitutes a violation of very basic principles of Ohio and Federal Law. Ohio Revised Code Section 2744.05(C) invades the province of the jury and is, therefore *unconstitutional.*

CONCLUSION

It has been determined by a jury that the Petitioner, Paulette Shelton is entitled to compensation in the sum of $750,000 as a result the negligent conduct of the Respondent. That decision of the jury has now been usurped by the combination of unconstitutional legislation which has been inappropriately and retroactively applied by the Ohio Appellate Court. In essence, vested rights of the Petitioner have been taken by the State of Ohio without just compensation.

Ohio Revised Code Section 2744.05(C) is a clear and obvious violation of equal protection guarantees afforded by the United States Constitution, made applicable to the states by the Fourteenth Amendment. Ohio is left in a quandry by the decision rendered by the Appellate Courts in this case. Although this decision has a devasting impact upon the Petitioner, it has an even greater potential impact upon all citizens in Ohio as well as the entire United States.

According to the Ohio Department of Transportation there are currently 58 public transit systems in operation in the State of Ohio: 11 regional transit

systems (such as the Respondent herein), 3 county transit boards, and 44 public transit systems. In calendar year 1988 there were approximately 150 million public passenger trips in the State of Ohio alone; 78 million, over 50% of those trips, were in Cleveland by the Greater Cleveland Regional Transit Authority, the Respondent herein.

Statistics obtained from the U.S. Department of Transportation indicate that there were approximately 717 transit systems in operation during fiscal year 1987. There was approximately 670 million passenger miles traveled during that time period. Clearly, many millions of people are subjected or may be subjected to the unconstitutional retroactive application of the Ohio statute in question.

This case presents an opportunity for this Honorable Court to review important legal issues having lasting and substantial impact on the bench, bar, and citizens of each and every state in the Union. The clear and unambiguous unconstitutional ramifications of this decision can only be rectified by a review and decision rendered by this Honorable Court. The Petititioner therefore urges that a Writ of Certiorari issue to review the judgment and opinion of the Ohio Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

THE SUPREME COURT OF OHIO
1990 TERM

To wit: June 13, 1990

Case No. 90-278

Paulette Shelton,

Appellant,

v.

Greater Cleveland Regional Transit Authority et al.,

Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Nicholas M. DeVito & Associates.

(Court of Appeals Nos. 56287 & 56431)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX B

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT COUNTY OF CUYAHOGA

NOS. 56287, 56431

PAULETTE SHELTON

Plaintiff-Appellant
(No. 56287) and
Cross-Appellee
(No. 56431)

-vs-

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY, ET AL.

Defendant-Appellee
(No. 56287) and
Cross-Appellant
(No. 56431)

JOURNAL ENTRY
and
OPINION

DATE OF ANNOUNCEMENT OF DECISION:	DECEMBER 7, 1989
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court Case No. 118,941
JUDGMENT:	**Case No. 56287 is Affirmed. Case No. 56431 is Reversed and Judgment is Entered for the Transit Authority.**
DATE OF JOURNALIZATION:	_____

APPEARANCES:

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J.F. CORRIGAN, J.:

In this consolidated appeal, the defendant regional transit authority seeks reversal of a jury trial judgment for the plaintiff on her negligence claim stemming from her rape at a transit authority rapid station (Case No. 56431). The plaintiff appeals from the trial court's denial of her motion for prejudgment interest on the $750,000 jury award (Case No. 56287).

The transit authority, in five assignments of error, claims that the trial court erred in (1) denying its motions for a directed verdict and for judgment notwithstanding the verdict, (2) admitting the testimony of a former transit authority board member who criticized management policies and admitting testimony relating to the rape of another woman by the plaintiff's attacker on the previous day, (3) admitting the testimony of an expert witness where the plaintiff failed to file an expert witness report pursuant to local rule, (4) finding R.C. 2744.05(C), which limits damage awards against political subdivisions to $250,000, unconstitutional, and (5) denying the transit authority's motion for remittitur.

The plaintiff, in her two assignments of error, argues that the trial court abused its discretion in denying her motion for prejudgment interest and erroneously excluded evidence in support of that motion, which concerned the transit authority's failure to cooperate in discovery. We find that the trial court erred in denying the transit authority's directed verdict motion, so we reverse the trial court's judgment and order judgment for the transit authority.

I.

The plaintiff bases her negligence claim essentially upon the transit authority's failure to adequately provide for system security, adequately light the transit authority parking lot where the rape occurred, and to increase security at the rapid station in response to the rape of a transit authority passenger the previous day.

The thirty-four-year old plaintiff testified that at approximately 6:00 on January 15, 1985, she left the rapid train at her local station in the City of East Cleveland on her way home from work. She walked to her car, which she had parked in the transit authority lot earlier that day "a few" parking spaces away from the entrance to the rapid station. When she reached her car, she heard someone approach her from behind. She turned and saw a young man who pointed a gun at her and said, "If you scream, I will blow your brains out." The youth ordered her into her car and raped her three times. Afterward, he drove her through the neighborhood for a short time until the plaintiff was able to flee when at one point her attacker stopped the car. She ran to a nearby store located within Cleveland City limits in order to obtain assistance. There, Cleveland police responding to her call, met and interviewed her. Later that evening, the police arrested the suspect and the plaintiff identified him as her assailant. The police took the plaintiff to a local hospital where she was examined and treated.

One month later authorities advised her that the suspect had a venereal disease. She underwent preventative treatment at that time. The plaintiff stated that this information caused her additional anguish.

The plaintiff described the lighting at the parking lot where the attack occurred as being "not bright". On cross-examination, however, she stated that the lighting was "adequate". The plaintiff said that the rapid station had been constructed so that the fare attendant could not see the parking lot from his booth.

The plaintiff testified that a transit authority police officer interviewed her at the hospital before her release. Upon telling the officer that she had been raped at the rapid station parking lot, the officer, referring to a rape of a passenger the previous evening, exclaimed in surprise, "[T]his happened last night." The plaintiff's father corroborated this testimony.

The plaintiff said that she was too upset to live at her home alone with her two children in the month following the rape. During that period, she lived with her mother for a period and thereafter with her sister. She claims that she has "flashbacks" of the attack and hyperventilates whenever she goes near a rapid station.

The plaintiff claimed that the rape severely disrupted her personal life. Because of the rape, the seven-year relationship she had with her former boyfriend ended. She distrusts men and has been unable to maintain any relationship with a man since the rape. She has periods where she cannot sleep and occasionally her sleep is disturbed by nightmares of the attack. She becomes irrationally upset with and unreasonably protective of her two teenage children. She becomes enraged and cries for no apparent reason. She refuses to go out of her home at night. The plaintiff testified that none of these behaviors existed prior to the rape.

The plaintiff further testified in regard to the economic losses she sustained as a result of the rape. She currently

works as a word processor at a local board of education. She has been employed there for three years. At the time of the rape, she had just started a temporary job as a word processor at a local office. She stated that she lost no time from that job as a result of the rape. She went back to work the morning following the attack. However, the plaintiff testified that at the time of the rape she had just completed the first year of a three-year evening court reporter program. She stated that she fully intended to complete that program and become a professional court reporter, but discontinued that program after the rape. The witness claimed that as a court reporter her income would have been "substantially increased".

The plaintiff testified that since the attack three mental health professionals have treated her. She sees her current psychologist on an irregular basis when she feels a need to discuss her problems. The plaintiff stated that she has declined to participate in group therapy as her psychologist has advised. She testified that her bills for psychological treatment amount to $490 and that she also paid $137.50 for her treatment at the hospital emergency room.

The two Cleveland police detectives who first responded to the plaintiff's call for help testified. They stated that they found the plaintiff in a severely distraught condition. After receiving a description of the suspect from the plaintiff, they toured the area and shortly thereafter apprehended him. The plaintiff identified him as her attacker.

One of the detectives claimed that at a later time he discussed the case with the East Cleveland detective in charge of the investigation. The detective told him that because of a rape the previous evening the East Cleveland police department had stationed officers at the rapid station to look for the rapist. The detective told him that the East Cleveland police could not understand how they missed apprehending the rapist on the night that he attacked the plaintiff.

The victim of the previous night's incident testified that she was leaving the rapid station when her attacker walked up behind her, stuck a gun in her back, and walked her down the street away from the station where he forced her to engage in sexual acts with him. She escaped and reported the attack to the East Cleveland police department.

The plaintiff's mother, father, sister, seventeen-year-old son, fourteen-year-old daughter, former boyfriend, and co-worker all testified with respect to the effect the rape has had on the plaintiff's personality. In substance, their testimony discloses that since the rape the plaintiff has become reclusive, prone to emotional outbursts, prone to bouts with severe depression, and overly protective of her children. Deep anxieties concerning men have inhibited both her work and social relationships. She has developed phobias concerning public transportation and travelling during the night.

The plaintiff's family doctor testified that he examined the plaintiff three weeks after the rape. He described her as being "anxious" and "very upset". He described the albeit necessary procedures performed on rape victims in emergency rooms as being "degrading". The doctor administered medication to her to treat potential venereal disease. In discussing this treatment with the plaintiff, he observed that she was anxious about contracting the disease from her attacker. The doctor testified that he charged the plaintiff $35 for the treatment.

The plaintiff called as an expert witness a psychologist who specializes in post-traumatic stress syndrome. The witness testified that he examined the plaintiff in 1987 and 1988 and found that she exhibited the traditional symptoms of post-traumatic stress disorder as a result of the rape. He stated that during his sessions with the plaintiff she would occasionally lapse into trance-like states. She continued to feel terror and anger in connection with the

rape and experienced flashbacks of the actual attack. The plaintiff informed him that she had difficulty sleeping since she feared another attack by the rapist. She would consistently awake from her sleep and experience panic attacks.

The plaintiff lacks concentration at work because she is "obsessed with the trauma of the rape". Because of the experience she does not trust anyone, particularly men. The witness opined that because of the experience it would be nearly impossible for her to establish a normal relationship with a man. The witness stated that the plaintiff feels unsafe when travelling from her home, which inhibits her ability to obtain the treatment that she requires. The doctor diagnosed the plaintiff as suffering from chronic post-traumatic stress syndrome of a permanent nature caused by the rape. He concluded that the plaintiff lives with "[a]stronomical pain" which will exist at some level for the rest of her life.

The plaintiff called as if on cross-examination the transit authority's former general manager, the original transit authority security chief, and the current chief of transit security. Both security directors also testified on behalf of the transit authority.

The former general manager of the transit authority testified that he was manager of operations at the time of the attack on the plaintiff. He stated that the transit authority's policy was to protect its passengers "as much as possible" and to also protect transit authority property. The witness conjectured that in 1985 the transit authority allocated approximately $2,200,00 of its $125,000,000 budget to security. He recalled that in 1982 or 1983 he instructed the chief of security to increase the patrols at the rapid stations and to assign available security personnel to as many stations as possible. The witness testified that at that time the transit authority, in response to citizen complaints, assigned officers to a beat patrol at a

rapid station where many crimes had been reported. The transit authority also installed a surveillance camera at that station using federal monies. In January of 1985 the transit authority held public hearings to address citizen complaints concerning transit authority security.

The original chief of transit security testified that he held his position from 1976 to 1983. He testified that the state legislature created the transit police in 1977 with the purpose of protecting transit authority passengers, employees, and property. The transit police's jurisdiction included bus routes, rapid lines, the rapid stations, and the rapid station parking lots. The witness stated that the number of officers employed by the transit authority fluctuated from a high of 34 to a low of 20 at the time when he retired in 1983.

The former chief testified with regard to the general mode of deployment of security personnel. He stated that the transit police operated three shifts. On a daily basis the transit police had six to eight officers to patrol on each shift. On rare occasions, no officers were available for patrol duties. The department generally assigned a single patrol car manned by one or two officers to each of the transit authority's three patrol zones. Occasionally only two cars were assigned to patrol the three zones. The patrols were expected to inspect the rapid stations in their zones twice during each shift. Additional officers when available were assigned to ride the rapid and bus lines and to patrol the rapid stations and parking lots. Each patrol car was equipped with a two-way radio and each officer on foot patrol carried a walkie-talkie. A central transit authority police dispatcher monitored the entire network.

The witness testified that the transit authority police maintained a working relationship with the municipal police departments within the system. Municipal police commonly responded to complaints of offenses occurring on

transit authority property. Generally, the local police forwarded to the transit police copies of reports of arrests made on transit authority property. The chief admitted that manpower was a problem for the transit authority police.

The current chief of transit police testified that in his opinion the transit authority needs 57 patrolmen in order to effectively police the system. Currently the system includes 51 full time officers and 80 part-time officers hired from local municipal police departments. He stated that the rapid station where the attack occurred was not a high crime area. He further testified that that station's parking lot has adequate lighting.

The plaintiff called as an expert witness a former transit authority board member. The witness began working for the transit authority in 1979 as an administrative consultant rendering advice concerning employee productivity. In 1983 the witness became director of administrative services in charge of data processing and procurements. In 1986 the transit authority fired her from that position. County commissioners appointed her to the transit authority's board of trustees later that year where she served for one and one-half years.

The witness testified that the rapid station where the plaintiff was raped was a high crime area. She stated that until 1984 system security was a high priority with transit system management. She testified that at that time the combination of round the clock patrols and that installation of a surveillance camera solved the crime problem at one rapid station.

The witness testified that in 1984 and 1985 the transit authority consistently received complaints from the public concerning inadequate lighting and infrequent security patrols at rapid station parking lots. She testified that in 1984 and 1985 approximately 19 security personnel patrolled the 494 square miles of the transit authority service

area. She claimed that generally only two patrol cars were available to patrol the entire system. She described the transit authority security policy in 1984 and 1985 as being "[w]ilfully inadequate." She testified that she resigned from the transit authority board of trustees due to management's corruption and incompetence.

The plaintiff further called as a witness a former transit authority police officer who served from 1977 to 1983. He testified that generally six to seven officers patrolled during each shift. Generally three patrol cars were assigned to patrol although occasionally no automobiles were available for patrol due to maintenance problems. He described the lighting at the lot where the attack occurred as being "[v]ery poor" and described the station as being a high crime area.

The witness testified that his superiors expected the zone cars to patrol each of the rapid stations at least once during each shift. However, he claimed that often rapid stations would go unpatrolled during a shift because the patrols were occupied responding to various complaints. The witness stated that he left the transit authority police in 1983 due to his frustration with the department's lack of equipment and personnel. He opined that the system required 150 officers supplemented by surveillance cameras in order to provide adequate security.

Two East Cleveland police officers testified in regard to the recorded criminal activity at the rapid station where the plaintiff was raped. Testifying from police records and their own experience with the station, they stated that numerous violent crimes were committed at the rapid station from 1975 to 1985.

One of the officers testified that the plaintiff's attacker admitted raping another woman under similar circumstances the night before. The actual rape of that victim occurred at a nearby fast food restaurant. He further stated that East Cleveland police regularly patrol that rapid station. The officer described that station as being well-lit

but described the adjoining parking lot as being poorly lit. He stated that the rapid station was a high crime area.

The plaintiff called as an expert witness a veteran Cleveland police sergeant. The witness testified that he personally inspected the rapid station where the attack on the plaintiff occurred and further inspected the transit authority and East Cleveland criminal records. He stated that the rapid station is a high crime area. He described the lighting at the rapid station as being poor for the purposes of security.

The transit authority called as a witness the maintenance supervisor for its rapid stations. He stated that he was familiar with the lighting at the rapid station parking lot at the time of the rape of the plaintiff. He testified that the lighting in 1985 was substantially the same as the current lighting. The witness stated that thousand watt flood lights illuminated the parking lot from poles on the street bordering the parking lot. He claimed that these lights adequately illuminated the parking lot.

The transit authority called as a witness the former East Cleveland detective who investigated the attack on the plaintiff. He testified that the East Cleveland police regularly patrolled the rapid station and responded to complaints of criminal activity at the station. The former detective testified that his department did not regularly report arrests made and complaints received concerning the rapid station to transit authorities.

The transit authority also called as a witness a former transit authority police officer who served on the force from 1983 to 1985. The officer testified that he generally patrolled the zone which included the rapid station where the rape occurred. He stated that department policy required zone car patrols to be within 15 minutes' response time to the rapid stations within the patrol zone. The witness testified that by mutual agreement the municipal

police departments generally responded first to criminal complaints at the rapid stations.

The officer recalled that he was on patrol in a zone car at the time of the rape. He stated that the department assigned one other officer to a foot patrol of the rapid line in his zone that day. The officer testified that he went to the hospital where the plaintiff had been admitted upon receiving a radio report of the rape at the rapid station. There he met an East Cleveland police officer who was handling the investigation. He left the hospital after the two agreed that the East Cleveland police department would be responsible for the investigation. The witness denied having any knowledge of a rape occurring the previous evening. The witness who currently works as an East Cleveland police officer testified that there is no protocol between the transit police and the municipal police calling for the exchange of reports of crime committed at the rapid station.

The transit authority also called as a witness a transit police sergeant employed by the system since 1977. She testified that originally the transit police force consisted of twelve officers. The force in 1985 consisted of approximately 26 officers. The officer stated that the lighting at the rapid station where the rape occurred brightly illuminated the parking lot.

At the conclusion of the plaintiff's evidence and at the close of all the evidence, the transit authority moved for a directed verdict. The trial court denied these motions. The jury found for the plaintiff on her claim and awarded $750,000.

The trial court denied the transit authority's motions to limit damages pursuant to R.C. 2744.05(C) and for remittitur. In denying both motions, the trial court specifically found the statute's damage limitation unconstitutional. The trial court further overruled the transit authority's motion for judgment notwithstanding the verdict and the plaintiff's

motion for prejudgment interest pursuant to R.C. 1343.03(C).

II.

The transit authority first argues that the trial court erred in overruling its motions for a directed verdict and for judgment notwithstanding the verdict.

The standard to be applied by a trial court in determining a motion for a directed verdict is the same standard to be applied in ruling on a motion for judgment notwithstanding the verdict. *Osler* v. *Lorain* (1986), 28 Ohio St. 3d 345, 347. The trial court must grant these motions where the evidence adduced at trial, construed most strongly in favor of the non-moving party, discloses that reasonable minds could come to but one conclusion on a determinative issue and that conclusion is adverse to the party opposing the motion. *Id.*; cf. Civ. R. 50. The trial court, in making this determination, considers neither the weight of the evidence nor the credibility of the witnesses. *Osler* v. *Lorain, supra,* at 347.

In this case, construing the evidence most strongly in favor of the plaintiff, we find that the plaintiff failed to set forth any evidence which would support a claim for relief against the transit authority.

The Supreme Court of Ohio has recently ruled that a municipal corporation may not be found liable in negligence for its police department's failure to protect an individual from criminal activity absent a showing that the municipality owed a special duty of care to that individual. See *Sawicki* v. *Ottawa Hills* (1988), 37 Ohio St. 3d 222. This common law standard applies to those actions, including this action, which accrued prior to November 20, 1985, the effective date of the current law which defines political subdivision liability. *Id.*, at 225; see, generally, R.C. 2744.01; R.C. 2744.02.

The court recognized the continued vitality of the "public duty rule" which immunizes government bodies from negligence liability for the failure to discharge a legally imposed duty owed to the general public. *Id.*, at paragraph two of the syllabus. Implicit in this rule is the notion that no governmental entity can be held liable for making fundamental policy decisions which are characterized by a high degree of administrative judgment and discretion. *Id.*, at 225-226.

The court stated the one exception to the rule. A municipal corporation may be held liable where a "special duty" existed between the municipality and the injured party.

> "In order to demonstrate a special duty or relationship, the following elements must be shown to exist: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking."

Id., at paragraph four of the syllabus.

We perceive no valid reason why the public duty rule and its exception as stated in *Sawicki* v. *Ottawa Hills, supra*, should be limited in their application to municipal corporations to the exclusion of regional transit authorities. Pursuant to R.C. 306.31, the transit authority is defined "as a political subdivision of the state and a body corporate with all the power of a corporation * * *." The Revised Code authorizes the maintenance of security operations "necessary for the protection of persons and property under [the transit authority's] jurisdiction and control." R.C. 306.35(4). Accordingly, a transit authority's duty to pro-

vide security within its jurisdiction differs in no significant respect to the general public duty a municipality has in providing security within municipal boundaries.

In concluding that the public duty rule applies in this case, we further determine that the special duty exception to the rule does not apply. Clearly, there is no evidence that the transit authority assumed through promises or actions an affirmative duty to protect the plaintiff in her individual capacity. There is no evidence that the plaintiff and the transit authority had any direct contact from which an expression of a security commitment could have been communicated. Further, there is no evidence that the plaintiff justifiably relied upon an affirmative promise of security by the transit authority. See *Sawicki* v. *Ottawa Hills, supra,* at paragraph four of the syllabus.

The plaintiff premises her claim of negligence upon the transit authority's failure to allocate additional economic resources in order to (1) increase the size of its police force, (2) equip rapid stations with surveillance cameras, and (3) improve the lighting at rapid station parking lots. She further faults the transit authority for its failure to deploy its limited security resources to prevent the repetition of one crime when her evidence is that the entire transit system is burdened with criminal activity.

However, to permit liability on this basis would invite an assault upon the public coffers. Every governmental body faces budgetary restrictions and few can afford to fund "ideal" security operations. Liability cannot be predicated upon legislative and administrative allocations of scarce resources to security needs. Assuming *arguendo* that we would recognize liability on this basis, the plaintiff simply presented no evidence establishing the unreasonableness of the security budget in light of (1) other operational demands upon the transit authority budget, or (2) funding for security among similarly situated transit systems.

The transit authority's first assignment of error has merit, so we reverse the trial court's judgment on this basis and order a final judgment for the transit authority on the plaintiff's claim. Pursuant to App. R. 12(A), we briefly address the remaining assignments of error submitted by both parties although our disposition of this assigned error effectively decides these appeals.

III.

The transit authority, in its second assigned error, argues that the trial court erred in permitting testimony concerning the prior rape and in permitting the former transit authority board member to testify that transit authority management operated in a corrupt and inefficient manner.

Generally, evidentiary rulings are matters within the sound discretion of the trial court. Cf. *Calderon* v. *Sharkey* (1982), 70 Ohio St. 2d 218, 223. Accordingly, we shall not overrule the trial court's evidentiary determinations absent a showing that the trial court acted unreasonably, unconscionably, or arbitrarily. Cf. *Id.*

The transit authority first complains that the trial court erred in admitting evidence concerning the prior rape. Our review of the record discloses that the transit authority has waived its right to challenge portions of that testimony by failing to timely object at trial. See Evid. R. 103(A)(1). Further, the trial court severely restricted remaining testimony on this subject to the issue of whether the transit authority had in fact been notified that the rape had occurred. The trial court refused to admit the victim's hospital report and excluded testimony concerning the details of the attack which may have posed a danger of unfair prejudice. See Evid. R. 403(A). While we question whether notice has any relevance in this case, we recognize that the trial court has broad discretion in admitting marginally probative evidence on collateral issues. Cf. *Parma* v. *Man-*

ning (1986), 33 Ohio App. 3d 67, 69. We conclude that this claim lacks merit.

The transit authority next complains that the trial court permitted the testimony of the former transit authority board member. Over the transit authority's objections the witness testified that the transit authority's security force was "willfully inadequate". She explained again, over objection, that she resigned from the transit authority board because of management's corruption and incompetence.

We find that the trial court committed reversible error in admitting this opinion testimony. The record shows that the plaintiff failed to elicit any testimony from the witness which would establish the witness as an expert in transit security. Thus, her testimony was inadmissible as expert testimony. See Evid. R. 702 (qualification of expert witness). The trial court could not properly admit her testimony as lay opinion testimony since it was not rationally based upon her perception. Evid. R. 701(1). Her opinions were wholly without foundation since she admitted at trial that she (1) never was directly involved in transit authority security operations, (2) was unfamiliar with transit authority records concerning criminal activity in the system, and (3) was unfamiliar with police manpower, deployment policies, or budget at the time of the rape.

These opinions substantially prejudiced the transit authority in light of their definitive, critical nature and the witness' former position with the transit authority.

This claim has merit.

IV.

The transit authority, in its third assignment of error, argues that the trial court erred in permitting the Cleveland police sergeant to give expert testimony. The transit authority argues that the witness failed to supplement his deposition responses with an expert witness report prior

to trial pursuant to local rule. See Local Rule 21(B) of the Court of Common Pleas of Cuyahoga County, General Divison. The transit authority deposed the witness three days before the beginning of trial and claims that his testimony at trial substantially differed from his deposition testimony and resulted in "trial by ambush."

However, the transit authority failed to file the deposition testimony of the expert witness, so we are unable to determine whether substantial prejudice actually resulted. The party appealing from an adverse judgment bears the burden of providing an adequate record on appeal which demonstrates the claimed error and prejudice to the complaining party. *Bean* v. *Bean* (1983), 14 Ohio App. 3d 358, 362. Accordingly, we overrule this assigned error since the record on appeal fails to demonstrate prejudicial error in this regard.

V.

The transit authority, in its fourth assignment of error, argues that the trial court erred in finding that R.C. 2744.05(C) violates the retroactive law prohibition of Section 28, Article II, of the Ohio Constitution, and the Equal Protection Clauses of the Ohio and United States Constitutions. We agree.

R.C. 2744.05(C) provides for a limitation of damage award in personal injury actions against political subdivisions. The statute provides:

> "(C)(1) There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death actions brought pursuant to Chapter 2125. of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences and that do not represent the actual loss of the person who is awarded the damages

shall not exceed two hundred fifty thousand dollars in favor of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not applying to court costs that are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a political subdivision.

"(2) As used in this division, 'the actual loss of the person who is awarded the damages' includes all of the following:

"(a) All wages, salaries, or other compensation lost by the person injured as a result of the injury, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings of such a person;

"(b) All expenditures of the person injured or another person on his behalf for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;

"(c) All expenditures to be incurred in the future, as determined by the court, by the person injured or another person on his behalf for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary because of the injury;

"(d) All expenditures of a person whose property was injured or destroyed or of another person on his behalf in order to repair or replace the property that was injured or destroyed;

"(e) All expenditures of the person injured or whose property was injured or destroyed or of another person on his behalf in relation to the

actual preparation or presentation of the person's claim;

"(f) Any other expenditures of the person injured or whose property was injured or destroyed or of another person on his behalf that the court determines represent an actual loss experienced because of the person or property injury or property loss.

" 'The actual loss of the person who is awarded the damages' does not include any fees paid or owed to an attorney for any services rendered in relation to a person or property injury or property loss, and does not include any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss."

On April 30, 1983, the state legislature made the statute retroactive to actions accruing prior to November 20, 1985. See Sub. S.B. No. 297, Section 3.

The trial court, while finding the statute expressly applicable to the plaintiff's case, determined that the damages limitation unconstitutionally limited the plaintiff's right to recovery.

We first note the presumed constitutionality of legislation passed by the state legislature. *Hardy* v. *VerMeulen* (1987), 32 Ohio St. 3d 45, 48. Whether a statute violates Section 28, Article II of the Ohio Constitution's prohibition against retroactive laws requires the determination of whether the statute substantively impairs legal rights. *VanFossen* v. *Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, paragraph three of the syllabus. Remedial legislation may constitutionally be applied retroactively. Cf. *Id.*

The ordinary meaning of the terms generally provide the basis for distinguishing between "remedial" and "substantive" legislation. *Id.*, at 108.

A statute is substantive if it (1) impairs or takes away vested rights, (2) affects accrued substantive rights, (3) imposes additional burdens or liabilities to past transactions, (4) creates new rights, or (5) creates or precludes the right to bring or defend legal actions. *Id.*, at 107. "Remedial laws are those affecting only the remedy provided. These include laws which merely substitute a new or more appropriate remedy for the enforcement of an existing right." *Id.*, at 107.

Applying these standards to R.C. 2744.05(C) requires the conclusion that the statute is remedial and is not an unconstitutional retroactive law. The statute places no limitation on the recovery of actual damages. The law ensures a substantial maximum amount for provable, intangible injuries rather than denies meaningful compensation for these losses by permitting only nominal awards. The statute forecloses no cause of action. The law makes no change in the basis for liability which either lessens or increases the plaintiff's chances of recovery. Compare *VanFossen* v. *Babcock & Wilcox Co.*, *supra*, at 108-109. Since the law is remedial in nature, it fully comports which the Ohio Constitution's restrictions on retroactive legislation.

We further determine that R.C. 2744.05(C) satisfies equal protection guarantees. The threshold issue in equal protection analysis applicable to the instant action is whether the statute restricts a "fundamental right". Cf. *Bd. of Edn.* v. *Walter* (1979), 58 Ohio St. 2d 368, 373.

The trial court determined that R.C. 2744.05(C) infringes upon the fundamental right of an "open court" as set forth in Section 16, Article I of the Ohio Constitution:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or

> reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.
>
> "Suits may be brought against the state, in such courts and in such manner as provided by law."

It is clear under the final clause of that section that the Ohio Constitution grants the state legislature the power to limit suits against government institutions. Accordingly, R.C. 2744.05(C) does not violate the Ohio Constitution's open court guarantees. Further, R.C. 2744.05(C) in no way forecloses a personal injury plaintiff from obtaining compensation from a liable political subdivision. Here, too, the law is remedial in nature rather than substantively restricting a fundamental right.

Since R.C. 2744.05(C) is constitutional, the trial court erred in failing to impose the legislated liability restrictions.

VI.

The transit authority, in its final assignment of error, claims that the trial court erred in overruling its motion for remittitur. The transit authority argues that passion and prejudice influenced the jury's verdict and that the evidence does not support the jury's $750,000 verdict.

In determining whether passion or prejudice influenced a jury's award, a reviewing court must consider the amount of the award and whether the damages were induced by (1) incompetent evidence, (2) misconduct by the court or counsel at trial, or (3) any other action at trial that may reasonably be said to have swayed the jury. *Loudy* v. *Faries* (1985), 22 Ohio App. 3d 17, 19. Here, there is no evidence that passion or prejudice influenced the jury's award. The trial court certainly erred in admitting the testimony of the transit authority board member who accused the transit authority of corruption and incompetence. However, this testimony in and of itself would not appear to have unfairly

influenced the jury. Further, the trial court carefully restricted testimony concerning the prior rape in order to avoid unfair prejudice. The plaintiff's testimony concerning her rape and subsequent mental anguish could properly be considered by the jury in determining a compensatory award.

Although passion or prejudice did not influence the jury's verdict, the trial court should have ordered remittitur since the evidence does not support the $750,000 award. Cf. *Cox* v. *Oliver Machinery Co.*, (1987), 41 Ohio App. 3d 28, 35. The plaintiff has shown only $650 in actual damages. She admitted that she did not miss any work as a result of the rape. She claims that the rape caused her to withdraw from a court reporting school and that that represented a "substantial" loss of future income. However, these damages are too speculative since at the time of the rape the plaintiff had only completed a fraction of her schooling. More importantly, the plaintiff failed to produce any evidence showing the actual difference between her foreseeable income at her present occupation and projected earnings as a court reporter.

We recognize that the plaintiff suffered mental injuries that are verified by expert testimony. These injuries could be fairly compensated. However, we conclude that $750,000 for the plaintiff's mental injuries was patently unwarranted. Accordingly, we conclude that the trial court erred in failing to grant remittitur and reducing the award to an amount which would fairly compensate the plaintiff.

VII.

The plaintiff, in her two assignments of error, asserts that the trial court abused its discretion in overruling her motion for prejudgment interest. In particular, she claims that the trial court erred in finding that the transit authority had made a good faith effort to settle the case as required pursuant to R.C. 1343.03(C).

"The decision as to whether a party's settlement efforts indicate good faith is generally within the sound discretion of the trial court." *Kalain* v. *Smith* (1986), 25 Ohio St. 3d 157, 159. A reviewing court shall not reverse the trial court's determination on this issue absent a showing that the trial court abused its discretion. *Id.* The term "abuse of discretion" connotes more than an error of law or judgment; it implies an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. *Blakemore* v. *Blakemore* (1983), 5 Ohio St. 3d 217, 219.

> "A party has not 'failed to make a good faith effort to settle' under R.C. 2343.03(C) if he had (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."

Kalain v. *Smith, supra.*

In this case, the transit authority had an objectively reasonable belief that it had no liability. As this court has determined and as the transit authority has maintained throughout these proceedings, the plaintiff had no basis for obtaining relief for her injuries from the transit authority. Accordingly, the transit authority had no obligation to tender any settlement offer although the record establishes that the transit authority in fact offered a $40,000 settlement prior to trial. We conclude that the trial court correctly exercised its discretion in denying the motion for prejudgment interest.

The plaintiff further contends that the trial court erred in excluding evidence, at the hearing on the plaintiff's motion, of the transit authority's failure to cooperate in pretrial

discovery. However, any error in the trial court's ruling would be harmless since the transit authority had no duty to settle the case due to its objective, reasonable belief that it had no liability. Cf. Evid. R. 103(A) (error must affect substantial right of complaining party).

Accordingly, we overrule the plaintiff's two assignments of error and affirm the trial court's denial of her motion for prejudgment interest. Based upon our disposition of the transit authority's first assignment of error, we order judgment for the transit authority on the plaintiff's claim.

Case No. 56287 is affirmed. Case No. 56431 is reversed and judgment is entered for the transit authority.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAVID T. MATIA, P.J., and
MITROVICH, J., CONCUR.*

/s/ John F. Corrigan
JOHN F. CORRIGAN
JUDGE

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* Judge Paul H. Mitrovich, Lake County Common Pleas Court, sitting by assignment.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

APPENDIX C

IN THE COURT OF COMMON PLEAS
STATE OF OHIO COUNTY OF CUYAHOGA

CASE NO. 118941

PAULETTE SHELTON,

Plaintiff,

-vs-

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY,

Defendant.

JUDGMENT ENTRY
AND
OPINION

ROBERT M. LAWTHER, J.:

This matter is before the Court on the *Motion to Limit Plaintiff's Damage Award* filed by the defendant, Greater Cleveland Regional Transit Authority. Upon consideration of this Motion, the briefs and exhibits filed by the parties, and the record, the Court makes the following determinations:

On March 18, 1988, at the conclusion of a jury trial, a verdict was rendered in favor of plaintiff, Paulette Shelton, against defendant in the amount of $750,000. Defendant now seeks to limit plaintiff's damage award to no more than $250,000 pursuant to the sovereign immunity damages cap set forth in R.C. 2744.05(C).

In pertinent part, the statute provides that in an action against a political subdivision to recover damages for personal injury in connection with a governmental or proprietary function, any damages that do not represent the "actual loss" of the person who is awarded damages shall not exceed $250,000. R.C. 2744.05(C)(1). On April 30, 1986, the statute was made retroactive by the Ohio Legislature to apply to certain actions accruing prior to November 20, 1985. *See* Sub. S.B. No. 297, Section 3.

In the case at bar, it is not disputed that the provisions of R.C. 2744.05(C) are expressly applicable to plaintiff's cause of action, even as retroactively applied (plaintiff's action accrued on or about January 15, 1985). Thus, it is unnecessary to reach the allegations in plaintiff's Complaint or those facts adduced at trial. Instead, plaintiff argues that the damages limitation of $250,000 set forth in the statute is unconstitutional as written and as applied to her case.

Plaintiff contends that R.C. 2744.05(C) is violative of diverse federal and state constitutional guarantees such as equal protection, due process, right to jury trial, the prohibition against the passage of retroactive laws, etc. In addressing these contentions, the Court is mindful that acts of the Ohio Legislature are presumed valid. *Hardy v. Ver Meulen* (1987), 32 Ohio St. 3d 45, 48 *Accord, State v. Dorso* (1983), 4 Ohio St. 3d 60, 61; *Peebles v. Clement* (1980), 63 Ohio St. 2d 314, 321.

The ban upon the enactment of retroactive legislation is set forth in Section 28, Article II of the Ohio Constitution. In analyzing whether a statute is unconstitutionally retroactive in violation of this provision, an initial determination whether the statute is "substantive" or merely "remedial" is required. *Van Fossen v. Babcox & Wilcox Co.* (1988), 36 Ohio St. 3d 100, paragraph three of the syllabus.

The Ohio Supreme Court has held that this prohibition has application to laws affecting *substantive* rights, but that it has no reference to laws of a *remedial* nature providing rules of practice, courses of procedure or methods of review. *Kilbreath v. Rudy* (1968), 16 Ohio St. 2d 70. *Accord, French v. Dwiggins* (1984), 9 Ohio St. 3d 32, 33.

The Court finds that plaintiff's accrued right to bring a civil action for damages has been impaired by the Legislature's imposition of a $250,000 damages cap in suits against political subdivisions. A newly enacted statute which takes away or impairs an accrued common law cause of action deals with vested substantive rights, not remedial rights, and is within the purview of the constitutional inhibition against the legislative enactment of retroactive laws. *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, paragraph two of the syllabus; *Van Fossen, supra*, at 107.

In a situation similar to that presented in the case at bar, the Court in *Grayley v. Satayatham* (1976), 74 Ohio Op. 2d 316, struck down the Medical Malpractice Act of 1975 as unconstitutional as retroactively applied, holding that the new statutes affected substantive rights of the parties. The Court stated:

> There can be no question about this, particularly with reference to R.C. 2307.43 ($200,000 damages cap), which attempts to limit the amount of compensatory damages in medical claims only. *Id.* at 321.

Therefore, based upon the above considerations, the Court finds that the sovereign immunity damages cap of R.C. 2744.05(C) affects plaintiff's substantive rights. Accordingly, the Court further finds that the retroactive application of this statute to plaintiff's action is unconstitutional as violative of the prohibition against the

passage of retroactive laws. Section 28, Article II of Ohio Constitution.

Having found the damages cap unconstitutional as applied to plaintiff, the Court nevertheless feels compelled to write at some length about plaintiff's other constitutional challenges to the statute. Plaintiff claims that the damages limitation of $250,000 set forth in R.C. 2744.05(C) violates the equal protection clause of the Ohio and United States Constitutions.

As framed by the parties, the equal protection issues before the Court are: (1) whether a "fundamental right" is impacted by R.C. 2744.05(C), and, if so, (2) whether the State can demonstrate a "compelling state interest" to justify the classifications inherently created by the statute. Once the existence of a fundamental right is shown, the State assumes a heavy burden of proving that the legislation is constitutional under the "strict judicial scrutiny" test given above. *Shapiro v. Thompson* (1969), 394 U.S. 619; *Bd. of Edn. v. Walter* (1979), 58 Ohio St. 2d 368, 373-74.

The Court finds that plaintiff's substantive right to bring a civil action for damages is a fundamental right. The Court's holding is based on the so-called "open court" provision of the Ohio Constitution, which provides in pertinent part:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Section 16, Article I of Ohio Constitution.

Courts in Montana have also concluded that the right to bring a civil action for personal injuries is a fundamental right, warranting strict scrutiny analysis for any statutory scheme affecting this right. *White v. State*, 661 P. 2d 1272

(Montana 1983), paragraph four of the syllabus; *Pfost v. State*, 713 P.2d 495 (Montana 1985), paragraph six of the syllabus. In *Pfost*, the Supreme Court of Montana held that a person has a fundamental interest in obtaining full legal redress for injuries sustained. *Id.* at 503.

Therefore, because a fundamental right of plaintiff is impacted by R.C. 2744.05(C), the State must demonstrate a "compelling" state interest to justify the enactment of a $250,000 damages cap in suits against political subdivisions only. Defendant maintains that the State of Ohio has a compelling interest in preserving the ability of governmental bodies to provide services expected by their citizenary.

While protection of municipal treasuries and preservation of governmental resources are legitimate state interests, the Court does not believe they are compelling. Payment of tort judgments is simply a cost of doing business for a municipality. *White v. State, supra*, at 1275.

There is no evidence in the record that the payment of these claims would create a financial crisis or would impair the ability of the State or one of its political subdivisions to function as a governmental entity. Furthermore, the State has an interest in affording fair and reasonable compensation to citizens victimized by its negligence. *Id.*

Additionally, defendant has not proven that sufficient public funds will now be available to municipalities after the passage of R.C. 2744.05(C) to provide the services their citizens demand. Defendant has merely shown that the cost of municipal liability insurance coverage has increased and, consequently, that some municipalities have cut back on the services they offer.

The Court finds that this showing falls short of justifying a discrimination which infringes upon fundamental rights. Accordingly, as no compelling state interest has been demonstrated to justify the enactment of a $250,000

damages limitation in suits against political subdivisions only (R.C. 2744.05(C)), the Court further finds that the statute is unconstitutional as violative of the equal protection guarantee of the Ohio and United States Constitutions.

The Court will not address plaintiff's remaining constitutional arguments beyond stating that plaintiff has no federally created right to a jury trial in state courts, *Minneapolis & St. Louis R.R. v. Bombolis* (1916), 241 U.S. 211; and that plaintiff lacks legal standing to lodge a constitutional challenge to R.C. 2744.05(C) on behalf of privately owned transit companies. See *Anderson v. Brown, Mayor* (1968), 13 Ohio St. 2d 53.

For the foregoing reasons, the Court holds that the sovereign immunity damages cap set forth in R.C. 2744.05(C) is unconstitutional as retroactively applied to plaintiff's action, and is unconstitutional as written for violation of the equal protection clause of the Ohio and United States Constitutions. Accordingly, defendant's Motion to Limit Plaintiff's Damage Award pursuant to R.C. 2744.05(C) is overruled and the jury verdict will stand.

IT IS SO ORDERED.

/s/ Robert M. Lawther
ROBERT M. LAWTHER, JUDGE

DATED: June 22, 1988.

CERTIFICATE OF SERVICE

A copy of the foregoing Judgment Entry and Opinion was forwarded, by ordinary U.S. Mail, postage pre-paid to:

Nicholas M. DeVito, Esq.
Nicholas M. DeVito & Associates
1000 Terminal Tower
Cleveland, Ohio 44113

Russell T. Adrine, Esq.
Robert E. Davis, Esq.
615 Superior Avenue, N.W.
Cleveland, Ohio 44113

and to

Niki Z. Schwartz, Esq.
Kent R. Markus, Esq.
Gold, Rotatori, Schwartz & Gibbons Co., L.P.A.
1500 Leader Building
Cleveland, Ohio 44114

this 22 day of June, 1988.

/s/ Robert M. Lawther
ROBERT M. LAWTHER, JUDGE

APPENDIX D

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Articles in addition to, and amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth article of the original Constitution.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Effective 1791)

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

(Effective 1791)

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

APPENDIX E

CONSTITUTION OF THE STATE OF OHIO

ADOPTED MARCH 10, 1851

Art. II, § 28

§ 28 Retroactive laws.

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

APPENDIX F

OHIO REVISED CODE

§ 2744.05 Limitations on damages awarded.

Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function:

(A) Punitive or exemplary damages shall not be awarded;

(B) If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to such benefits. Nothing in this division shall be construed to limit the rights of a beneficiary under a life insurance policy or the rights of sureties under fidelity or surety bonds.

(C)(1) There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death actions brought pursuant to Chapter 2125, of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences and that do not represent the actual loss of the person who is awarded the damages shall not exceed two hundred fifty thousand dollars in favor of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not apply to court costs that

are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a political subdivision.

(2) As used in this division, "the actual loss of the person who is awarded the damages" includes all of the following:

(a) All wages, salaries, or other compensation lost by the person injured as a result of the injury, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings of such a person;

(b) All expenditures of the person injured or another person on his behalf for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;

(c) All expenditures to be incurred in the future, as determined by the court, by the person injured or another person on his behalf for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary because of the injury;

(d) All expenditures of a person whose property was injured or destroyed or of another person on his behalf in order to repair or replace the property that was injured or destroyed;

(e) All expenditures of the person injured or whose property was injured or destroyed or of another person on his behalf in relation to the actual preparation or presentation of the person's claim:

(f) Any other expenditures of the person injured or whose property was injured or destroyed or of another person on his behalf that the court determines represent an actual loss experienced because of the personal or property injury or property loss.

"The actual loss of the person who is awarded the damages" does not include any fees paid or owed to an attorney for any services rendered in relation to a personal or property injury or property loss, and does not include any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss.

HISTORY: 141 v H 176, Eff 11-20-85.

APPENDIX G

AUTHORITIES INVALIDATING DAMAGE CAPS

Cases which have invalidated damage caps include: Thomas v. Miami Valley Hosp., Ohio, Montgomery C.P., Ct., No. 83-2918. (Feb 7, 1986) ($200,000 cap invalidated); Boyd v. Bulala, ___ F. Supp. ___ (D. Va. 1986) (Cap violates right to a jury trial under the 7th Amendment of the U.S. Constitution and also under the Virginia Bill of Rights); Waggoner v. Gibson, ___ F. Supp. ___ (N.D. Tex. 1986) (Cap of $500,000 violates equal protection of the state and federal constitution and the access to court's provision of the state constitution); Duren v. Suburban Community Hosp, 24 Ohio Misc. 2d 25, 482 N.E.2d 1358 (1985) ($200,000 cap on general damages violative of equal protection of state and federal constituions); Florida Medical Center, Inc., v. Von Stetina, 436 So. 2d 1022 (Fla. App. 1983) (Cap violative of equal protection and due process); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) ($300,000 cap violates equal protection and due process provisions of state and federal constitutions); Graley v. Satyatham, 74 Ohio. Op. 2d 316, 343 N.E.2d 832 (1976) (Cap on damages and partial abrogation of collateral source rule); Jones v. State Bd. of Medicine, 555 P.2d 399 (Idaho 1976) (Cap on damages denies equal protection under Idaho Constitution; Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976).